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Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM 1964

No. 643

PIOCHE MINES CONSOLIDATED, INC., ELY VALLEY MINES, INC., and JOHN JANNEY,
Petitioners,

vs.

HELEN DOLMAN, LAWRENCE RUST LEE, JAMES KEITH MARSHALL, JR., E. P. R. DUVAL, and KATHERINE HANSBROUGH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit

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Subject Index

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Constitutional provisions, statutes and federal rules involved	3
Statement of the case	6
Reasons for granting the writ	10
Indispensable parties	11
Indispensable parties damaged by judgment	14
That the judgment is "in favor" of Pioche Consolidated, does not cure the defect of not hearing indispensable parties	15
Future litigation	16
Basis for default	17
Basis of judgment	20
Conclusion	23

Table of Authorities Cited

Cases	Pages
Chicago, M., St. Paul and P. R. Co. v. Adams County (CCA 9, 1934), 72 F.2d 819	12, 13, 16
City of Davenport v. Dows, 18 Wall. 626, 21 L.ed. 938	11
Davis v. Henry (CCA 6), 266 F. 266	16
Delno v. Market St. Railway Co. (CCA 9, 1942), 124 F.2d 965	12, 13, 16
Flynn v. Brooks, 105 F.2d 766	16
Hooey et al. v. Wilson, 9 Wall. 501, 19 L.ed. 762	13, 16
King v. Wall and Beaver St. Corp., 145 F.2d 377	11
Koster v. Lumbermens Mut. Cas. Co., 67 S.Ct. 828, 330 U.S. 518, 91 L.ed. 1067	11
Mallow v. Hinde, 12 Wheat. 198, 6 L.ed. 599	13
Meyer v. Fleming (1946), 66 S.Ct. 382, 327 U.S. 161, 90 L.ed. 595	11
Philipbar v. Derby, 85 F.2d 30	11, 13
Pioche Mines Consolidated, Inc. v. Fidelity Trust Company (CCA 9, 1953), 202 F.2d 944	12, 16, 22
Pioche Mines Consolidated v. Hon. Roger T. Foley (CCA 9, 1956), 237 F.2d 164	22
Price v. Gurney, 65 S.Ct. 513, 324 U.S. 100, 89 L.ed. 776	11
Shields v. Barrow, 17 How. 130, 15 L.ed. 158	13, 16
State of California v. Southern Pacific Company (1894), 157 U.S. 229, 15 S.Ct. 591, 39 L.ed. 683	13, 16, 17
Twin-Lick Oil Co. v. Marbury (1875), 91 U.S. 587, 23 L.ed. 328	21
Washington v. United States (CCA 9), 87 F.2d 421	12, 13
Watts v. Alexander, Morrison and Co., 34 F.2d 66, aff'd 45 F.2d 968	11
Young v. Powell (CCA 5, 1950), 179 F.2d 147	12, 15, 16

Statutes

Nevada Revised Statutes: Pages
Section 11.010 22
Sections 11.060-11.080 22
Sections 11.100-11.130 22
Section 11.150 22
Section 11.190 22
Section 111.315 22
Section 111.320 22
Section 247.190 22

28 U. S. Code 1254(1) 2

Constitutions

United States Constitution, Amendment Five 3

Rules

Federal Rules of Civil Procedure:
Rule 23(b) 4, 8
Rule 30(b) 5, 7, 17, 18, 19, 20, 24
Rule 37(d) 4, 5, 20

Local Rule, Civil No. 7 USCD Nev. 5, 6, 7, 19

Texts

Moore's Federal Practice, Second Edition, Par. 19.13..... 11

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Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on May 21, 1964, from which Petitions for Rehearing were denied on August 3, 1964.

OPINION BELOW

The judgment of the United States District Court for the District of Nevada appears at R. 1238.†

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 333 F. 2d 257.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was made and entered May 21, 1964, and copies thereof are appended to this petition in the appendix at pages 35-37. The Opinion appears at pages 1-33 of the appendix. Petitions for Rehearing were denied August 3, 1964 (Record, Vol. 24). The jurisdiction of this Court is invoked under 28 U.S. Code 1254 (1).

QUESTIONS PRESENTED

1. Whether a party who applies for relief from a deposition because of illness, and after the court refused to permit evidence in support of his application and refused to grant a hearing thereon, does not appear under the advice of his counsel, may have his pleadings struck and his default entered without further notice to him, and have a $1,000,000 judgment rendered against him while being refused a hearing.

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†Pages of the Transcript of Record on Appeal (Volumes 1-5) are abbreviated R. ——; pages of the Reporter's Transcript and the Exhibit Book (Volumes 6-23) are abbreviated T. ——.

2. Whether a trial court may proceed to judgment in a derivative stockholders' action while refusing to hear the defendant corporations who oppose the action. Are the corporations indispensable parties? Does setting aside their default require that the judgment be set aside?

3. Whether a default may be entered in favor of a plaintiff, at the same time striking the motions of all defendants that challenge the right of the plaintiff to be in court, and then proceed to judgment.

4. Whether attorneys may maintain an action on behalf of a client who has no standing to sue by adding the names of other parties as plaintiffs without their having knowledge of the complaint or consenting thereto.

5. Whether (1) the use of investors' money in accordance with the terms under which the funds were advanced, and (2) the use of a resulting income so as to be in accordance with War Production Board contracts, and (3) without benefit to the party charged, may form the basis of a derivative stockholders' action charging conversion of the income so used.

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

U. S. Constitution, Amendment Five:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." (Constitution of the United States, Amendment Five.)

Federal Rules of Civil Procedure:

Rule 23 (b): *"Secondary Action by Shareholders.* In an action brought to enforce a secondary right on the part of one or more shareholders of an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort." (Federal Rules of Civil Procedure, Rule 23 (b).)

Rule 30 (b): *"Orders for the Protection of Parties and Deponents.* After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain

matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." (Federal Rules of Civil Procedure, Rule 30 (b).)

Rule 37 (d): *"Failure of Party to Attend or Serve Answers.* If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party." (Federal Rules of Civil Procedure, Rule 37 (d).)

Local Rule, Civil No. 7 USCD Nev.:

"Motions and Other Matters

* * *

"(b) *Notice to Be Given by Clerk:*

"Upon the filing of a motion or any other paper required to be served on the opposite party or his attorney, if oral argument shall be permitted by the court, the clerk of the court shall notice the

matter for hearing at a time at least ten days after the date of service, or at such time thereafter as may be convenient to the Court." (Local Rule, Civil No. 7 (d), USDC, Nevada.)

STATEMENT OF THE CASE

In a derivative stockholders action, Respondents sought to collect $1,000,000 from Petitioner Janney on behalf of Ely Valley Mines, Inc., and Pioche Mines Consolidated, Inc., and further sought to restrain the President of the Defendant Corporations.

Both corporations answered and counterclaimed to the complaint (R. 54), and on May 29, 1961, Petitioner Janney appeared, and answered and counterclaimed (R. 534). These answers demanded jury trial (R. 66, R. 587).

An amended complaint was filed June 6, 1961, naming four additional parties plaintiff (R. 623). This complaint did not show the required diversity of citizenship.

Petitioners moved to dismiss the Amended Complaint on this ground (R. 630).

In September, 1961, Petitioner Janney fell ill, requiring a course of treatment of some two months (T. 286, lines 9-12). Knowing of this illness (T. 284, line 23, to T. 285, line 2), Respondents' Counsel thereupon sought discovery of Petitioner Janney, noticing his deposition to take place *before* the cure could be completed (R. 688). Petitioners moved for relief

under Federal Rule 30 (b) (R. 690), asking, among other things, for a delay in the deposition until Petitioner Janney could recover from his serious illness (R. 698).

The Nevada District Court has no Motions Day, as is authorized under Federal Rule 78, which would enable a party to notice for hearing a Motion under Federal Rule 30 (b). The Local Rules (Local Rule, Civil No. 7, USDC Nev.) provide that a hearing on a motion may only be set by the Court.

Therefore, Petitioners' counsel requested the Trial Court to set their Rule 30 (b) Motion for hearing before the time noticed for the deposition (R. 689), but the Trial Court refused to do so (T. 472, T. 321, line 24, to T. 322).

However, on October 31, 1961, the motion for relief under Rule 30 (b) was brought on for hearing at the time set for a motion in another action (T. 322, lines 1-5), and was denied (R. 1402). On October 31, 1961, Respondents petitioned for the appointment of a receiver over defendant corporations (R. 726, R. 1403). The following day, the default of all petitioners was entered (R. 745), and on December 6, 1961, the motion for the appointment of a Receiver was granted (R. 1383). On March 26, 1962, the Trial Court appointed a receiver (R. 969) and on October 8, 1962, entered judgment (R. 1238).

The Court of Appeals reversed the judgment against the corporations (Opinion, p. 32), ordered the appointment of the receiver vacated (Opinion, p. 33),

and directed that the default of the corporations be set aside (Opinion, p. 32).

However, the Court of Appeals affirmed the $1,000,000 Default judgment (Opinion, p. 32, Item 2), and affirmed in part the restraining order against the corporations' President (Opinion, p. 32, Item 9).

After corporations answered and counterclaimed Respondents moved to strike the portions of the counterclaim which asserted that the complaint failed to comply with the requirements of Rule 23 (b) FRCP and was brought for vexatious purposes.

The trial court (Ross, J) denied the motion to strike, stating:

> "A study of the complaint herein reveals that the plaintiff has ignored almost all the requirements of Rule 23 (b), particularly the clause that has been underlined in the above quotation." (R. 218.)

This refers to the requirement:

> *"that the plaintiff was a shareholder at the time of the transaction of which he complains."* (R. 217.)

Immediately after the filing and service of the answer and counterclaim of the corporations, asserting non-compliance with Rule 23 (b) (R. 63), the first of a series of letters to Pioche Mines Consolidated stockholders (R. 482, lines 6-13) was circulated seeking co-plaintiffs in the action (R. 229-232).

This letter was sent on the letterhead of Respondents' attorneys (R. 228). In the series of letters to

stockholders, in which Respondents' attorneys participated with Respondent Dolman (R. 481, lines 16-23), the stockholders were assured that "no financial obligation whatsoever" would be incurred, if these stockholders authorized Dolman's attorneys to join them in the suit (R. 458, R. 466).

Thereafter, an amended complaint, adding the names of four stockholders of Pioche Mines Consolidated, Inc. who were stockholders of long standing, was filed (R. 623), together with a motion for leave to file the Amended Complaint (R. 277). It later transpired that none of these additional stockholders had engaged respondents' attorneys or even knew the suit was being brought in their names (see, for example, the affidavit of Lawrence Rust Lee filed with the Court of Appeals (Record, Vol. 24)).

The answer and counterclaims of Petitioner Janney asserted that the action against him and the corporations was brought pursuant to Respondent Dolman's written and oral threats demanding that the control of an important counterclaim of Pioche Mines Consolidated be turned over to her. It was contended by Petitioners that the four stockholders of Pioche Mines Consolidated whose names were used as co-plaintiffs had been deceived by the false representation of Dolman and her attorneys (R. 399). That the solicitations sent by Respondent Dolman and her attorneys induced responses from these stockholders is admitted at R. 482, lines 3-17, and is acknowledged in the Opinion at page 28, par. 2.

This counterclaim also asserted that the purpose of the action was to obstruct the prosecution of the counterclaim of Pioche Mines Consolidated, Inc. against Fidelity Philadelphia Trust Company (R. 583). This issue was not given a trial.

REASONS FOR GRANTING THE WRIT

The decision below allowed indispensable parties to an action to be excluded in a case that proceeded to judgment, adversely affecting the interest of the indispensable parties.

In this form, the case serves as precedent for denying a corporation that opposes a derivative stockholders' action the right to be heard.–This case thus conflicts with the decisions of other Circuits and of this Court which allow a corporation to oppose a derivative stockholders' action.

The important question of Federal law herein relates to illegally excluding evidence in disregard of the Constitutional requirements of Amendment V, that no person shall be deprived of life, liberty or property "without due process of law."

Property rights of Ely Valley Mines and Pioche Mines Consolidated in the mining property known as the Ely Valley Mine are made subject to default rulings of the Trial Court where the Circuit Court of Appeals has reversed the default order. This reversal shows to be unlawful the proceedings which excluded

both of these Corporations from cross-examining witnesses and presenting evidence.

Therefore, the decision below should be reversed because:

1. While the default of the corporations has been reversed, the damage to the corporations continues.

2. These corporations are indispensable parties to the action. Therefore a decision affecting their interest should not be rendered without their being heard.

3. A judgment claimed to be only against one defendant injuriously affects the two corporations whose default has now been ordered set aside.

INDISPENSABLE PARTIES

In a derivative stockholders' suit, *ipso facto,* the corporations are indispensable parties.[1] Recovery must accrue to the corporation.[2] The primary right sued on is that of the corporation.

Despite their answers (R. 54) and their demand for jury trial (R. 66), both corporations found all relief requested in the complaint was granted during their wrongful default.

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[1]*Meyer v. Fleming* (1946) 66 S.Ct. 382, 327 U.S. 161, 90 L.ed. 595; *Koster v. Lumbermens Mut. Cas. Co.*, 67 S.Ct. 828, 330 U.S. 518, 91 L.ed. 1067; *Price v. Gurney*, 65 S.Ct. 513, 324 U.S. 100, 89 L.ed. 776; *City of Davenport v. Dows*, 18 Wall. 626, 21 L.ed. 938; *King v. Wall and Beaver St. Corp.*, 145 F. 2d 377; *Philipbar v. Derby*, 85 F. 2d 30; *Watts v. Alexander, Morrison and Co.*, 34 F. 2d 66, aff'd 45 F. 2d 968.

[2]*Moore's Federal Practice,* Second Edition, Par. 19.13.

The corporations are "materially interested" and "injuriously affected." This also makes them indispensable parties to the action.[3]

It is well settled in the Ninth Circuit and elsewhere that indispensable parties must be heard if a Court is to enter a judgment in a case. In *Pioche Mines Consolidated, Inc. v. Fidelity Philadelphia Trust Company* (CCA 9, 1953), 202 F. 2d 944, 947, 8, the Court of Appeals for the Ninth Circuit quoted with approval from the case of *Washington v. United States* which set forth four questions that determine the matter of indispensability, saying: "If any one of the four questions is answered in the negative, then the absent party is indispensable."

The questions are:

> "(1) Is the interest of the absent party distinct and severable?
>
> "(2) In the absence of such party, can the Court render justice between the parties before it?
>
> "(3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party?
>
> "(4) Will the final determination in the absence of such party, be consistent with equity and good conscience?"
>
> *Washington v. United States* (CCA 9), 87 F. 2d 421, 427, 8.

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[3] *Chicago, M., St. Paul and P. R. Co. v. Adams County* (CCA 9, 1934), 72 F. 2d 819; *Delno v. Market St. Railway Co.* (CCA 9, 1942), 124 F. 2d 965; *Young v. Powell* (CCA 5, 1950), 179 F. 2d 147.

In this case, *all four* questions must be answered in the negative:

(1) Not only is the interest of the corporations not "distinct and severable," but it is the only interest that can be asserted in a derivative stockholders' action.[4]

(2) The Court cannot render justice to the corporations if they are denied the right to be heard before judgment is entered. Yet precisely this has happened, and the damage to the corporations continues, notwithstanding the fact that their default has been set aside.

(3) The injury to the corporations in this action is summarized below.

(4) The Court cannot do equity in a case where parties directly interested in the outcome are not heard, but are injured. Rather than avoiding further litigation by doing equity between all the parties, the instant case *generates* future litigation between the parties who were not heard.

The absence of an indispensable party deprives the Court of the right to make any decree in the subject matter.[5] In order to arrest the harm *to the corporations* from a judgment in a case where they were indispensable parties but were not heard, Petitioners

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[4]*City of Davenport v. Dows*, supra; *Philipbar v. Derby*, supra.

[5]*Shields v. Barrow*, 17 How. 130, 15 L.ed. 158, 160, 161; *Chicago M. St. Paul P. R. Co. v. Adams County* (CCA 9, 1934), 72 F. 2d 816; *State of Washington v. United States* (CCA 9, 1936), 87 F. 2d 421; *Delno v. Market Street Railway Co.* (CCA 9, 1942), 124 F. 2d 965; *Hooey et al. v. Wilson*, 9 Wall. 501, 19 L.ed. 762; *California v. Southern Pacific Company* (1894), 157 U.S. 229, 251 15 S.Ct. 591, 39 L.ed. 683, 691; *Mallow v. Hinde*, 12 Wheat. 198, 6 L.ed. 599.

applied to the Court of Appeals to arrest that judgment until the corporations could be heard. This application was denied.

This action should be reviewed because the wrongful default of the corporations has resulted in damage to the corporations without their being heard, and has also resulted in the suppression of evidence that could upset the entire basis of the judgment.

INDISPENSABLE PARTIES DAMAGED BY JUDGMENT

The Judgment damages Ely Valley Mines, Inc. as follows:

(1) It holds that the assets of Ely Valley are subject to claims of Pioche Mines Consolidated, Inc.

(2) By so holding, future profits from operation of Ely Valley Mine are subject to adverse claims.

(3) Also, future financing of Ely Valley is subject to a doubt that can only be cleared by further litigation.

(4) Ely Valley was not allowed to show by its records, by Pioche Consolidated records, and by other evidence, that its ownership of the Ely Valley Mine was not subject to any valid adverse claim.

(5) Ely Valley was not allowed to show that its contract with the war production board *required* the expenditure of income to equip the mine and increase production; that this contract provided premiums for the production of metals for the war effort; and that

these premiums made up the bookkeeping profits which were used to form the basis of the judgment.

(6) Ely Valley was not allowed to show that the suit was brought in the names of persons who did not authorize it, and that to the personal knowledge of one of such "plaintiffs," the claim was false.

Pioche Consolidated is damaged:

(1) By having its counterclaim against the Trust Company discredited by the judgment.

(2) By having its principal witness on the counterclaim discredited.

(3) By not being allowed to show that it had no claim to the Ely Valley Mine nor did any of its security holders have any claim.

(4) By exposure to future litigation made necessary by the judgment.

In addition, both corporations have a substantial interest in continuing to enjoy the services of their President. Their interests are prejudiced by a judgment that deprives them of these services.

For these additional reasons, the judgment should be reviewed.

THAT THE JUDGMENT IS "IN FAVOR" OF PIOCHE CONSOLIDATED, DOES NOT CURE THE DEFECT OF NOT HEARING INDISPENSABLE PARTIES

In *Young v. Powell*, the Court said:

> "The notion contended for and made so much of by appellee in argument; . . . that, in short,

> because the judgment as finally entered was in, rather than against, the interest of those not made parties; that because, in short, they suffered no prejudice by the suit but got benefits from it, the question of their indispensability disappears; wholly disregards the compelling equitable considerations which lie behind and give rise to the indispensable party rule. If permitted to prevail, it would make of it a delusion and a snare."
>
> *Young v. Powell* (CCA 5 1950), 179 F. 2d 147.

The instant case conflicts with this Fifth Circuit decision, and with *Pioche Mines Consolidated, Inc. v. Fidelity Philadelphia Trust Co.*, supra, *Chicago, M. St. Paul P. R. Co. v. Adams County*, supra, *Davis v. Henry* (CCA 6), 266 F. 266.

FUTURE LITIGATION

Future litigation will be necessary because issues are created among the parties affected by the judgment. The purpose of the rule is to avoid such a result.[6]

In *State of California v. Southern Pacific Company*, this Court said:

> "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the

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[6] *State of California v. Southern Pacific Co.* (1894), 157 U.S. 229, 39 L.ed. 683; *Delno v. Market St. Railway Co.*, 124 F. 2d 965; *Shields v. Barrow*, 17 How. 130, 15 L.ed. 158; *Hooey et al. v. Wilson*, 9 Wall. 501, 19 L.ed. 762; *Flynn v. Brooks*, 105 F. 2d 766.

> order of the court perfectly safe to those who are compelled to obey it and to prevent future litigation."
>
> *State of California v. Southern Pacific Company* (1394), 157 U.S. 229, 251, 15 S.Ct. 591, 39 L.ed. 683, 691.

In the instant case further litigation will be necessary to establish the right of the Ely Valley Mines, Inc. to the profits from its mines and the right of Pioche Mines Consolidated, Inc., to show that the claim asserted to the Ely Valley Mine is a fictitious claim.

Therefore, Petitioners ask that this Court review the judgment because it departs from the well-established law that indispensable parties must be heard.

BASIS FOR DEFAULT

The opinion below should also be reviewed because it is a radical departure from previous application of the Federal Rules.

The Opinion states that when a notice of deposition is served by the adverse party, and the deponent wishes to apply for relief under Rule 30 (b), but is unable to have the application heard before the time set in the Notice of Taking Deposition:

> "The least that he can be expected to do is to get an order postponing the time of the deposition until his motion can be heard." (Opinion, page 18.)

"An order postponing the *time* of the deposition," is one of the forms of relief that is available only under Rule 30 (b)!

The question is not whether the deponent was "under no duty" to appear for his deposition (Opinion, page 18); the question raised is whether a deponent is given a *right* to apply for relief under Rule 30 (b).

If this right is given under the Federal Rules, then the Rules must be construed so as to give a deponent an effectual way to exercise that right. The District Court Rules do not allow a party to set a motion under Rule 30 (b). A request was made to the District Court to set the matter for hearing.

Thus the deponent had taken all the steps available to him to obtain a hearing on the Rule 30 (b) motion prior to the time set for the deposition. The Rules should be construed, and the procedure of the District Court so conducted, as not to prejudice him because he attempted to apply for relief under Rule 30 (b).

If this is not done, then a party who has become seriously ill, so that attending a deposition could result in his death, is placed in the position that he must follow a demand made upon him by a notice of deposition served by an opposing party without any effective remedy to protect his health.

Petitioners had a right, under the rules, to a determination of their motion. Their motion was timely filed, and they took all measures that were available to them to obtain a ruling before the time noticed in

the Deposition. Their attempts to obtain this relief were sanctioned by the Federal Rules, and the exercise of this attempt to get relief was lawful.

The construction of Local Rule 7 appearing on page 19 of the Opinion appears to conclude that the communication from the Court of Petitioners' Counsel in response to their request that the Rule 30 (b) Motion be set for hearing, was a "ruling" on the motion. The Opinion states:

> "Here, opposition was filed, Appellees' (Appellants') counsel requested a hearing, and the Court, in reply, stated that Janney was to appear." (Opinion, page 19, lines 14-16)

This was not a ruling on the 30 (b) Motion.

Neither the Court, Petitioners' Counsel, nor Respondents' Counsel considered this communication from the Judge in a letter to be a "ruling" on the motion.

No Minute Order was entered showing that the motion had been disposed of when this letter was sent; Counsel for Respondents later agreed with the Court that the matter ought to be heard (T. 333).

Additionally, if the letter of the judge was the "ruling" on the motion, then it was an abuse of discretion because the showing in the record was uncontested that the deponent's ill health precluded his giving his deposition at that time.

Petitioners attempted to obtain relief for which they had a right to apply under the Federal Rules. They did not make an appearance at the deposition

"conditional upon the Court's granting relief." There is no attempt whatever to impose any conditions upon the Court. There was an attempt to exercise a right that had statutory authority, and which was necessary to exercise because of the illness. The Opinion (page 19) suggests that the course Petitioners should have followed was to apply for relief under Rule 30 (d).

The Rules provide that both Rule 30 (b) and Rule 30 (d) are available. Since both are sanctioned, a party should not be penalized for having selected one lawful course rather than another, which might not be as effective as the one chosen at the time.

In sustaining the entry of the default against Petitioner Janney, the Court of Appeals confused the inability to submit to a deposition at that time, as an unwillingness to undergo a physical examination.

Counsel for Respondents changed his position by requesting a default instead of a warrant to compel deposition (T. 491, lines 16, 17). The Trial Court immediately granted the default (T. 491) without allowing a hearing as required by Rule 37 (d). The failure of this Notice deprived Petitioners of the testimony of Dr. Dils and Dr. Darby and others who had knowledge of the material facts.

BASIS OF JUDGMENT

The Opinion broadens the basis for damages heretofore applied to derivative actions. The Ely Valley claims were opened up and developed with new money

supplied by Petitioner Janney and others. The risks of failure were taken by these investors. When the operation showed a profit, the money was put back each month to increase the next month's profit (T. 2040 ff.; T. 2441 ff.). Without this, profits would have been nominal only. If Petitioner Janney's management of the property had produced less profit, his damages under the Opinion would be less. These results are in conflict with decisions of this Court (*Twin-Lick Oil Co. v. Marbury* (1875), 91 U.S. 587, 593, 23 L.ed. 328, 331, 2).

The Opinion states that Pioche Mines Company was the "predecessor" of Pioche Mines Consolidated, Inc. (Opinion, page 22, line 18) which was "formed to take over the assets of Pioche Mines Company," (Opinion, page 22, lines 30, 31).

These statements reflect a misapprehension of the record.

Exhibit 15 quotes in full the statement "To the Stockholders of Pioche Mines Company," dated December 21, 1928, recorded in First Meeting of Incorporators and Directors of Pioche Mines Consolidated, Inc., ca. pp. 20, 22, 23:

> ". . . the new Company will start out with a *consolidation of properties entirely independent of Pioche Mines Company . . . The old Company will remain just as it now is . . .*" (Exhibit 15, emphasis added.)

Pioche Mines Consolidated, Inc. was *not* formed to take over and did not take over any of the assets of Pioche Mines Company, but on the contrary Pioche

Mines Consolidated, Inc. acquired 6 specific pieces of property, *not one* of which was an asset of Pioche Mines Company (First Meeting of Incorporators and Directors, Plaintiffs' Exhibit 15). The two corporations owned completely separate properties until the two companies were merged in 1943 (see Merger Agreement contained in Plaintiffs' Exhibit 15).

The Opinion does not apply the rule that parties claiming an interest in real property are notified by recorded conveyances. Both the Ely Valley Trust of 1939 and the conveyance from the Trustee to Ely Valley Mines, Inc. in 1949 were recorded in Lincoln County, Nevada (Exhibit 22), thus giving notice to the world (Nevada Revised Statutes; Secs. 111.315, 111.320 and 247.190) (See also N.R.S. Secs. 11.010, 11.060-11.080 and 11.190 (Statute of Limitations); and N.R.S. Secs. 11.100-11.130 and 11.150 (Adverse possession)). Both of these documents show that the Ely Valley property was to be the basis of a corporation that was separate and distinct from either Pioche Mines Company or Pioche Mines Consolidated, Inc.[7]

Yet the Opinion (p. 22) holds that the conveyance *by the trustee* of the mine in accordance with the re-

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[7]The purpose of *authorizing* (but not requiring) the trustee to use trust assets to help *Pioche Mines Company stockholders* (Plaintiffs' Exhibit 19) was to avoid complaints by investors, should Ely Valley assets be used to defeat the action by the bondholders, which it did (see *Pioche Mines Consolidated, Inc. v. Fidelity-Philadelphia Trust Co.* (CCA 9, 1953), 202 F. 2d 944; *Pioche Mines Consolidated v. Hon. Roger T. Foley* (CCA 9, 1956), 237 F. 2d 164). This matter has not yet been presented in a trial of the merits because of the default of all defendants.

quirements of his trust was a "conversion" of the mine by Petitioner Janney!

CONCLUSION

The default of Petitioners Ely Valley Mines, Inc. and Pioche Mines Consolidated, Inc. was properly set aside, but the judgment in the case from which they were wrongfully excluded was affirmed. The restraint of their President is affirmed; the million-dollar judgment is affirmed; and the suit is declared in good faith, all without the corporations being heard on their pleadings, which contest these issues.

The corporations were deprived of the right to require proof of these contested allegations or to offer evidence against them.

They were indispensable parties to the action, but they have been deprived of the right to be heard.

Investors who successfully shoulder the risks involved in developing a mining property are penalized in accordance with the success of their venture. The measure of damages is based upon the reinvestment of income that made the enterprise a success.

A party is defaulted on a million dollar claim when his deposition is noticed to take place before he can recover from a serious illness. He is denied a hearing at which he can testify and summon others to testify as to the nature and extent of his ailment; and as to whether his following his doctors' and his attorney's advice, and his seeking timely relief under Rule 30 (b)

made his absence a wilful violation of a court order or a notice of deposition.

If his attorney's advice was wrong, $1,000,000 penalty is too severe for following bad advice.

No defendant in the action has yet had a hearing on the merits, but judgment has been entered and affirmed despite the reversal of the default of two of the three parties defendant, who were indispensable parties to the action.

For these reasons, Petitioners ask that the Judgment be reviewed.

Dated, Berkeley, California,
October 28, 1964.

Respectfully submitted,
CHARLES O. BRUCE,
Counsel for Petitioners.

MORSE AND GRAVES,
ROSCOE H. WILKES,
T. DAVID HORTON,
Of Counsel.

(Appendix Follows)

Appendix

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PIOCHE MINES CONSOLIDATED, INC., ELY VALLEY MINES, INC., and JOHN JANNEY, *Appellants*, vs. HELEN DOLMAN, et al., *Appellees*.	No. 17,709
JOHN JANNEY, *Appellant*, vs. HELEN DOLMAN, *Appellee*.	No. 18,192

[May 21, 1964]

Appeal from the United States District Court
for the District of Nevada

Before: HAMLEY, BROWNING and DUNIWAY,
Circuit Judges

DUNIWAY, Circuit Judge:

Before us are 10 appeals, 9 in No. 17,709 and 1 in No. 18,192, all of which have been consolidated here. To a considerable extent, they are an imposition on this Court. Appellants' opening brief is 338 printed pages long, not counting 23 pages of appendix. It bears the characteristic stigmata of a forensic effort produced under the influence of strong emotion and written in the vocative. It is an unbridled attack on appellees, their counsel, and the trial judge. It starts with an assertion, repeated ad nauseam, that the judge accepted and acted upon allegations that

he knew to be false, and goes on from there, piling up charges on nearly every page. Material under the heading: "Questions presented" begins on page 36 and continues to page 87. There are set forth some 298 "questions" supposedly raised by the appeals. Nearly all of them are loaded with assertions, innuendoes and assumptions. We cite two examples, chosen at random, that are fairly typical:

> "May a court, in granting an intervention, prejudge contested issues"?
>
> "May a court conduct proceedings in an atmosphere hostile to one side"?

How such "questions" can help us to decide this case is beyond our comprehension.

The "specifications of error on which appellants rely" begin on page 87, and continue to page 151. There are 29 numbered "specifications," but each has many subdivisions, and they total 433. Needless to say, this type of specification of error is extremely burdensome rather than helpful to this Court. Appellants' printed reply brief is of 63 pages, and is accompanied by a two volume typewritten "supplement" of 276 pages. Were it not for the fact that to do so would further prolong this already protracted litigation, we would strike these "briefs" from the files.

One of the difficulties that confronted the trial judge, and that confronts us in trying to review what he did, is that appellants and their counsel have engaged throughout, in a course of obstruction and obfuscation. Their entire efforts seem to have been devoted to resisting discovery and to resisting trial. Their conduct exemplifies the old saying: if you can't try the case, try your opponent; if you can't try your opponent, try his lawyer; if you can't try his lawyer, try the judge. Appellants claimed from the beginning that the two actions constituted an abuse of process, and in their efforts to persuade the court to accept that view they subjected the court to a veritable blizzard of motions and papers, some bearing such truly anomalous titles as "Application for relief from misuse of court process obtained by fraud." What is sometimes called the "Clerk's transcript" consists of five volumes containing 1473 pages of assorted pleadings, motions, affidavits, exhibits and miscellaneous other papers, some of which were never before the trial court.

Throughout, appellants' position has been that the litigation is totally without merit. One cannot help wondering why, if this is so, appellants did not promptly answer, press for an early trial, and get a judgment to that effect. The charges of fraud, corruption, and worse, that counsel so freely flings at appellees, their counsel, and the court, are not supported by the record.

We will endeavor, within what we hope will be reasonable limits, to extract from the record, and to decide, those questions that seem to us to be worthy of consideration. To the extent that we do not discuss the "specifications of error" they are hereby rejected; to the extent that we do not answer the "questions presented," we reject them as not requiring answers.

1. *The appeal in No. 18,192.*

In No. 18,192 there is but one appeal. That action, numbered 310 below, was begun by appellee Dolman as a stockholder of Ely Valley Mines, Inc., a Nevada corporation (Ely), and Pioche Mines Consolidated, Inc., a Nevada corporation (Pioche), and on their behalf, seeking access to the records of the corporations. The defendants are John Janney, President, and one Calhoun, Secretary, of each of the two corporations. An amended complaint was filed on February 18, 1960, accompanied by a motion for an order granting access to the records, supported by an affidavit. The court, on the same day, granted the motion by an ex parte order. Armed with the order, Dolman did obtain an examination of the records.

No further action appears until over a year later, on March 13, 1961, when Janney filed an answer and counterclaim, charging that Dolman, in bringing the action, "perpetrated a complexity of frauds upon the Court." There follows a long statement of the alleged frauds, and a counterclaim, based upon similar charges. It names as counter-defendants Dolman and her attorneys. It contains some 13 counts, which pray for various amounts of damages, ranging from $18,000 to $800,000, plus large sums of punitive damages based upon alleged obtaining of money by false pretenses (count one), obtaining property for services not performed (count two), and by fraud (count three), interference with business relationships (counts four, five), stirring up stockholders and bringing malicious lawsuits (count six), abuse by

counsel of information obtained in confidence (counts seven, eight), and libel (counts nine, ten, eleven, twelve and thirteen). This interesting document occupies pages 378 to 467 of the transcript. It was accompanied by a motion to bring in the attorneys as cross-defendants. Simultaneously, counsel filed an affidavit charging the trial judge with prejudice.

Appellee Dolman filed an answer to the counterclaim on April 14, 1961. On April 20, she noticed the taking of Janney's deposition, at Las Vegas, on May 8, 1961. On May 4, 1961, Janney moved for an "order to show cause". In the motion, he sought an injunction against appellee Dolman that would prevent her "from making or circulating any further false statements" concerning him and the corporation, and other similar relief. A dismissal of the action and an injunction against further actions were also demanded. Much of this document is a rehash of the counterclaim.

Appellant Janney claims that on May 23, 1962, the trial judge refused to hear this motion, and the appeal is from this purported refusal. The record, however, shows only a request that the court set a date to hear it. The court said it could not do it "this morning." Court and counsel then reverted to a consideration of other matters, in another case. No order was made. There is nothing from which to appeal. The appeal should be dismissed.

2. *The appeals in No. 17,709.*

In No. 17,709, there are nine appeals. The action, No. 311 in the trial court, was filed by Dolman on February 20, 1960. It is a stockholders' derivative action, brought on behalf of stockholders of Pioche and Ely against them as nominal defendants, and Janney and a number of Does. It alleges that plaintiff is a citizen of California, that the two corporations are Nevada corporations, and, on information and belief, that Janney is a resident of Virginia. In substance, it is charged that Janney is president and in control of both corporations, that they have Nevada properties worth over $2,000,000, that Janney has permitted taxes to become delinquent and refuses to pay them and has failed to pay wages of employees, and that as a result the properties may be lost. It is also charged that Janney has mis-

managed the corporations, and diverted their assets to his own use, damaging the corporations in an amount exceeding $1,000,000.

On April 4, 1960, the two corporations answered. In addition to denials, the answer alleged that Janney resided in Nevada, charged Dolman with obtaining her stock by fraud, and alleged that the action was prosecuted for purposes of harassment. It contains a counterclaim, making similar charges. It also alleged failure to comply with Rule 23(b), F.R.Civ.P.

On August 1, 1960, the corporations filed a document entitled "application for relief from misuse of court process obtained by fraud." This charges, in substance, that the action, and the prior action No. 310, were strike suits, filed following refusal of Janney to yield to certain extortionate demands by appellee Dolman. It asks for a citation, purportedly under 28 U.S.C. §401, directed to Dolman, with a view to punishing her for contempt.

On August 3, 1960, Dolman answered the counterclaim. On August 26, she filed a reply to the "application for relief." On October 17, 1960, she asked leave to file an amended complaint. On October 19, she noticed the taking of the depositions of the corporations, by taking the deposition of Janney, on October 27, at the office of Pioche, in Pioche, Nevada. The notice required that the companies produce certain records. Janney did not appear. On November 3, Dolman moved for the corporations' default by reason of Janney's failure to appear.

The case (No. 311) was consolidated with certain other pending cases by an order made November 3, 1960. These are Fidelity-Philadelphia Trust Company v. Pioche Mines Consolidated, old No. 101, now No. 1221 (the Fidelity case), action No. 310, and Dodd, et al. v. Pioche Mines Consolidated, No. 1523 (the Dodd case). This order also set aside the hearing dates of all pending matters, and set pretrial for December 8. All parties were directed to submit, within 14 days, memoranda as to all pending matters.[1]

[1]The order states that the actions are "consolidated for any and all purposes relevant to their final disposition." Its immediate purpose was the disposition of a large number of motions and other matters then pending. This was later done, on June 6, 7 and 8, 1961. Matters in each case were then taken up separately, and thereafter each case was treated separately. The order thus became a dead letter.

On November 23, 1960, appellants, by their present counsel (former counsel having sought to withdraw) filed in the "consolidated" cases and in another case, Callahan Mining Corporation v. Ely Valley Mines, Inc., Nos. 17 and 26 (the Callahan case) an application for an injunction that would prevent all other parties from filing any more papers in any of the cases.

On May 29, 1961, Janney answered. This lengthy document contains the same charges of fraud, and the same counterclaim against Dolman and her attorneys, as the answer that was filed in No. 310, in March. It is an amazing melange of evidentiary statements, arguments, quotations from prior proceedings, etc., about as far from what a pleading ought to be as can be imagined.

On June 5, 6 and 7, 1961, the court conducted hearings, at which it passed on a large number of matters then pending in the four cases. In No. 311, it denied, without prejudice, the November 28, 1960 application for injunctive relief, granted a motion for relief from the depositions noticed, quashed the notice of deposition, denied a motion to re-calendar, denied the motion for default, granted leave to file an amended complaint, denied the application for relief from misuse of court process, and postponed pre-trial.

The amended complaint was filed June 6, 1961. It adds, as plaintiffs, four other stockholders of long standing, three residents and citizens of Virginia, and one of Arkansas. On information and belief, it alleges that Janney is a resident and citizen of Virginia, thus apparently destroying diversity of citizenship. On June 19, 1961, appellants moved to dismiss on that ground. On October 31, 1961, Dolman moved in open court for leave to strike the word "Virginia" and insert the word "Nevada" in the allegation as to Janney's citizenship. This motion was granted, and the change written in by hand.[2] Janney had previously filed a sworn statement that he was a citizen of Nevada.

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[2]The "questions" that appellants raise as to this action are fairly typical of their brief.

"(a) May a Court refuse to hear a Motion to Dismiss a Complaint for failure to show required diversity of citizenship?

"(b) May a Court allow an alteration of such a Complaint in an effort to show the required diversity?

On July 3, 1961, Dolman answered Janney's counterclaim. On August 16, she noticed the taking of his deposition, at Las Vegas, on September 19. On August 30, appellants filed a motion to quash the notice, claiming harassment, and also that plaintiffs had no standing to sue, that the court lacked jurisdiction, that Dolman's counsel were disqualified, and that it was improper to take the deposition while the appellants' May 1, 1960 motion for order to show cause[3] and June 16, 1961 motion to dismiss were pending. So far as appears, no opposition was filed and no action on this motion was taken. Janney did not appear on September 19.

On October 6, 1961, Dolman filed another notice to take Janney's deposition, at Las Vegas, on October 31. On October 20, another motion to quash was filed, on substantially the same grounds, plus a claim of poor health. It was accompanied by an

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"(c) May a Court allow a material alteration of a Complaint required by the Federal Rules of Civil Procedure to be sworn without this alteration being made pursuant to the procedure prescribed by the Federal Rules of Civil Procedure and without said alteration being sworn?

"(d) May a Court allow such alteration without requiring a showing that prejudice to the Defendants would not result; without requiring a showing of excuse or reason why the unamended Complaint was false in a material respect when sworn by the Complainant; without requiring a showing of circumstances that would warrant the amendment; and without determining the issues raised by Appellants' Motion for Order to Show Cause, Motions to Quash Notices of Deposition, and Application for Relief from Misuse of Court Process Obtained by a Fraud?

"(e) May a Court proceed on such defaced Complaint which purported to be the sworn statement of the Affiant, which it was not?

"(f) May a Court proceed on such defaced Complaint to the serious prejudice of Defendants' rights?

"(g) Does such procedure deprive Defendants of due process?"

The specification of error is similar:

"(a) The alteration of the sworn Complaint in a material matter (T 353:4-9) was forgery (R 984:19-22)."

The procedure was perfectly proper. Rule 15(a) F.R.Civ.P.; *Molnar v. National Broadcasting Co.*, 9 Cir., 1956, 231 F.2d 684.

[3]No such document appears in the transcript. There is such a document, filed May 4, 1961, in No. 310.

affidavit of a Utah naturopath, stating that Janney was ill. Opposition was filed on October 27.

On October 31, a hearing was had on the motion to quash. On that day, with permission of the court, Dolman also filed a motion to strike pleadings of defendants, for default judgment, and for appointment of a receiver of the two corporations. The motion was accompanied by affidavits. The court denied the motion to quash, but ordered an inquiry into Janney's health, to take place next day at 2:00 o'clock. It further ordered that, if Janney failed to submit to examination, it would strike his pleadings and enter judgment against him. Next day, Janney did not appear; the court heard certain testimony and granted the motion to strike and for default. A formal order was filed on November 2.

Notice of appeal from the minute order of November 1 was filed November 6, 1961. We call this

Appeal No. 1.

A second "supplemental" notice of appeal, from the November 2 order, was filed on December 18. We call this

Appeal No. 2.

On November 7, the court ordered a hearing on November 15, so that judgment could be entered. The hearing began on that date. On December 4, defendants filed a motion to set aside the November 2 order. This motion was heard on December 6, and denied, and a formal order of denial was filed on December 15.

On December 6, a minute order was made, granting Dolman's petition for appointment of a receiver, and temporary restraining order. Counsel was directed to prepare a formal order. Similar directions were given to counsel on December 7. On January 4, 1962, a notice of appeal from these orders was filed. We call this

Appeal No. 3.

A formal "restraining order and order re receiver" was signed and filed January 24, 1962, but the receiver was not then appointed. On February 5, 1962, a notice of appeal from this order was filed. We call this

Appeal No. 4.

On February 6, 1962, a motion was filed for an order requiring Dolman, et al., to give security in connection with the restraining order, as required by Rule 65(c), F.R.Civ.P. On March 16, 1962, a formal order, appointing one Americo Campini receiver of the two corporations, with bond of $150,000, was signed and filed. This order also contains a restraining order similar to that of February 5. On April 6, 1962, a notice of appeal from the March 16 order was filed. We call this

Appeal No. 5.

On March 20, 1962, the receiver petitioned for instructions. This petition was granted, and the receiver instructed, on the same day. On April 6, 1962, a notice of appeal from the March 20 order was filed. We call this

Appeal No. 6.

On March 26, 1962, appellants filed a motion to remove the receiver and "for general relief." On April 9, 1962, a motion to stay the order appointing receiver was filed. On May 18, 1962, a notice of appeal from the denial of the motions of March 26 and April 9, 1962 was filed. This notice states that the motions were denied by the refusal of the court, on April 25, to hear them. We call this

Appeal No. 7.

On April 25, 1962, the receiver filed his "first report" and petition for instructions. Objections were filed by appellants on April 27. On May 8, the receiver filed a request for authority to issue receiver's certificates, and another request for instructions. Opposition was filed May 10. Opposition to the motion for authority to issue receiver's certificates was filed May 21, 1962. On May 24, the court made an order instructing the receiver. On May 31, 1962, a notice of appeal from this order was filed. We call this

Appeal No. 8.

On October 8, 1962, judgment was filed and entered. This judgment continues the receivership, restrains appellant Janney and the corporations from disposing of any of the assets or records of the corporations, restrains Janney from disposing of his stock in the corporations, and gives judgment, in favor of the receiver and against Janney, in the sum of $1,000,000, plus interest and costs of $1,299.29. It awards Dolman her expenses in prosecuting the

action, plus "compensation" for her services, and fees to her attorneys. It directs that sums collected be apportioned between and paid to Dolman, her attorneys, and the stockholders of Pioche Mines Consolidated, Inc., exclusive of Janney. It retains jurisdiction for two purposes: to change the amount of the receiver's bond, and to instruct the receiver. Findings of fact and conclusions of law were filed at the same time. A notice of appeal from this judgment was filed on October 16, 1962. We call this

Appeal No. 9.

A. *Threshold Contentions.*

Appellants make several contentions that go to the right of the District Court to proceed at all. We consider these first.

1. *Jurisdiction of the trial court.*

Jurisdiction is based upon diversity of citizenship (28 U.S.C. §1332). The allegations of the original complaint showed the necessary diversity. But when the complaint was amended by adding new plaintiffs, some of them citizens of Virginia, diversity no longer appeared, it being also alleged that defendant Janney was a citizen of Virginia. This difficulty was eliminated by the amendment which the court permitted on October 31, 1961. Janney can hardly complain—he had alleged in his answer, filed on May 29, 1961, that he was a citizen of Nevada. The plaintiff, and the court, took him at his word. Under 28 U.S.C. §1653, a complaint may, with the permission of the court, be amended to show jurisdictional facts. *Molnar v. National Broadcasting Co.*, 9 Cir., 1956, 231 F.2d 684. The trial court had jurisdiction.

2. *Claimed failure to comply with Rule 23(b), F.R.Civ.P.*

The original complaint is certainly deficient in this respect. It does not allege that Dolman was a shareholder at the time of the transactions of which she complains, (Rule 23(b)(1)) or that the action is not collusive (Rule 23(b)(2)), and does not set forth with particularity the efforts made to secure the desired action from the trustees or directors or shareholders. It does allege, however, that Janney has for many years controlled the operation of the corporations, has purported to act through a board of directors, but in fact, has individually managed, directed and

controlled all of their activities, that he has left Nevada, and that the properties, assets and business of the corporations have been abandoned by the management and directors and by Janney. The complaint was accompanied by a motion for an order requiring payment of taxes on certain of the corporations' properties, together with an affidavit stating that but one stockholders' meeting of Ely, (and none of Pioche), has been held for many years, that demand that such meetings be held has been ignored, that Janney has denied plaintiff Dolman access to the books, that he has filed incorrect lists of directors with the Nevada Secretary of State, and various other matters.

The amended complaint adds four plaintiffs, each of whom is alleged to have been a stockholder of the corporations at all times mentioned in the complaint. Dolman acquired her shares on November 23, 1955. It also contains the required allegation that the action is not collusive.

We have recently held that the requirements of Rule 23(a) F.R.Civ.P. are not jurisdictional. *Harris v. Palm Springs Alpine Estates, Inc.*, 9 Cir., 1964, ... F.2d ..... (No. 18578, decided March 26, 1964). The reasoning applies equally to Rule 23(b). Jurisdiction is conferred by act of Congress. The Rules do not purport to diminish that jurisdiction. The purpose of Rule 23(b) is to protect the courts from collusive actions, and to protect corporations and their officers and directors from strike suits. It deals with procedure and relief, not jurisdiction.

We think that the complaint, the affidavit,[4] and the amended complaint show sufficient compliance with the Rule to the extent that the court had authority to proceed to the merits. At the least, the allegations show that demand upon the directors or stockholders would be futile. *Cathedral Estates, Inc. v. Taft Realty Corp.*, 2 Cir., 1955, 228 F.2d 85, 88; 3 Moore, Federal Practice, §23.19, p. 3525.

3. *Claimed disqualification of appellees' counsel.*

In appellants' "application for relief from misuse of court process obtained by fraud," in the answer and counterclaim filed

[4]As to the propriety of considering the affidavit, see *Lucking v. Delano*, 6 Cir., 1942, 129 F.2d 283.

by appellant Janney, in appellants' August 30, 1961 motion to quash notice of taking deposition, in their similar motion of October 20, 1961, in their March 26, 1962 motion to remove receiver and for other relief, and in their April 27, 1962 objections to the receiver's account, appellants asserted that appellees' counsel were disqualified by reason of their having been employed by appellants Janney and Pioche to represent Pioche in the Fidelity case. However, there is no paper in the file in action No. 311 in which appellants directly sought, in advance of trial, to have the court enjoin the attorneys from representing appellees, or to stay all proceedings by reason of the alleged disqualification, or to dismiss the action on that ground. Perhaps, by stretching language, the "application for relief from misuse of court process" can be construed as requesting some such relief. It was denied. Conflicting affidavits were filed. The court was not bound to believe those of appellants, and obviously did not.

The record indicates that present counsel for appellees were brought into the Fidelity matter (see *Pioche Mines Consol. v. Fidelity-Philadelphia Trust Co.*, 9 Cir., 1953, 202 F.2d 944; *Pioche Mines Consol. v. Fidelity-Philadelphia Trust Co.*, 9 Cir., 1953, 206 F.2d 336; *Pioche Mines Consol. v. Foley*, 9 Cir., 1956, 237 F.2d 164) by appellant Janney and appellee Dolman, who were then friendly and working together. At that time there was pending only a counterclaim by Pioche against the trust company. After some consultation, an amended counterclaim was filed, signed by those counsel and others. Thereafter, counsel and Janney disagreed about compensation, and counsel ceased to represent the counterclaimant. The papers in the record contain assertions that, in the course of conferences in reference to the Fidelity case, these counsel obtained confidential information useful to them in actions Nos. 310 and 311. This is denied by counsel. We might feel that, if we were counsel, we would not have participated in the present litigation, lest there be some such contention made, however baseless it might be. We cannot, however, say that the record made by appellants requires the conclusion, as a matter of law, that counsel should be forbidden to participate. We have examined the counterclaim in the Fidelity case, which is in the transcript, and we find that the issues there are quite different from the issues here. The information needed to enable coun-

sel to draw that counterclaim would not necessarily be useful to counsel in prosecuting actions Nos. 310 and 311 here involved. The same can be said of another action, the Callahan case, in which it is claimed that these counsel at one time represented Ely. We cannot say, assuming the point to have been properly raised, that the court erred in permitting counsel to proceed.

B. *The entry of default.*

One of the appellants' principal contentions is that the court erred in entering their default. Appeals Nos. 1, 2 and 9 relate to this default. It is more than doubtful whether the November 1 and 2 minute order and formal order are appealable, a question that we need not consider, since the propriety of these orders can obviously be considered in the appeal from the judgment (No. 9). The default was entered pursuant to Rule 37(d), F.R.Civ.P., for Janney's contumacious refusal to appear and testify at a properly noticed deposition.

It will be recalled that notices of intent to take his deposition were served on October 19, 1960, (as president of each of the two corporations), on August 16, 1961 (capacity not specified—by then he had appeared, answered and counterclaimed), and on October 6, 1961. As to each of the two latter notices, a motion to quash was filed. In June, 1961, the court quashed the first notice without opposition by appellees, because the court wanted a fresh start. For the same reason, and at the same time, it denied appellees' motion to enter the default of the corporations. That motion was based upon Janney's failure to appear in response to the first notice, but was not pressed. The motion to quash the second notice was not acted upon, and again Janney did not appear. When the motion to quash the third notice was filed, counsel for appellants wrote to the judge, calling attention to the fact that the deposition was noticed to be taken at the courthouse, and suggesting that the motion to quash be heard at the time for which the deposition was noticed. The judge replied that he would expect Janney to appear, but Janney did not appear, although his counsel had told him about the notice and about the judge's letter.

In response to an inquiry, counsel stated that Janney was "not available" and would not be there, on the ground that he was

advised by counsel that he need not appear because the motion to quash was on file. Rule 30(b), F.R.Civ.P. was cited. Appellees' counsel then asked leave to file a motion for default judgment.

The court allowed the filing, declined to consider that motion or the motion to quash at that time, but did begin an inquiry as to why Janney did not appear. Appellees' counsel suggested the issuance of a bench warrant, and the court then decided to consider the motion to quash as well. It treated the prior motion to quash as also before it, most of the grounds urged in both motions being similar. Insofar as the motions were based on the three grounds discussed in this opinion under the heading "Threshold Contentions," the court denied them. This was not error.

The court then considered the claim that Janney's health would not permit his appearance. The court inquired of Janney's two counsel as to Janney's whereabouts. Each replied: "I am not sure." The court indicated that poor health was the only possible meritorious ground for not requiring Janney to depose forthwith. It obviously, and properly, was in doubt as to whether the claimed disability was genuine. Counsel for Janney conceded that his physical condition would not prevent his coming to Las Vegas to be examined. The court therefore ordered that Janney appear at 2:00 o'clock the next day for a physical examination, at appellees' expense, by two doctors to be selected from lists to be submitted by each side. The order provided that if either side should not submit a list, it was to be deemed to have waived its right to do so, and to be satisfied with the doctors submitted by the other side. The court indicated that if Janney did not submit to the examination, it would grant appellees' motion for his default. Janney's counsel did not designate any doctors, and the court chose two designated by appellees. The court then signed a written order.

The next day the following colloquy occurred:

"COURT: How are we getting along with Mr. Janney's deposition?

MR. HORTON: [of counsel for Janney] We are not.

COURT: Is he going to come here today?

MR. HORTON: No, Your Honor.

COURT: He is not coming?
MR. HORTON: No."

• • • •

"COURT: I would like to find out what Mr. Janney is going to do about these depositions. You better get him over here at two—you still have time.
MR. HORTON: If Your Honor please, if I might tell you what I can tell you about this at this particular time—last night I called Mr. Calhoun, [secretary of Pioche] in Pioche and he advised me that he took Mr. Janney to Caliente on Tuesday—that would be a week ago yesterday, to see Dr. Dills who recommended that Mr. Janney go away somewhere and take a rest where he would not be disturbed . . . ."

• • • •

"MR. WILKES: [of counsel for Janney] Mr. Calhoun's message was to me that Mr. Janney was advised by his doctor to seclude himself for a period of rest; that he was in bad condition. So far as I know, Your Honor, none of us know where he is actually at the present time."

Horton did not correct this statement.

"COURT: I see—anything else?
MR. HORTON: I talked to Dr. Dills who confirmed he had told Mr. Janney that he ought to get away where he could be relieved from tension. This was also last night.
COURT: Who is Dr. Dills?
MR. HORTON: He is a physician in Caliente, Nevada, Your Honor, and from one of the two of them, there was some mention made of a week or ten days—I don't recall."

After further questioning of counsel, and discussion of the possibility of issuing a bench warrant, the court recessed until 2:30 o'clock to reconsider the matter.

When the court reconvened appellees' counsel suggested that one of Janney's counsel, Horton, be required to take the stand. He testified:

"Q Mr. Horton, would you tell us, please, when the last time was you talked to Mr. Janney?
A I talked to Mr. Janney last night on the telephone.

Q Where was he at that time?
A The call was placed to the residence of a man named Williams in Houston, Texas."

• • • •

"COURT: Where was that, from where?
A At the residence of a man named Williams in Houston, Texas."

• • • •

"Q When you spoke to Mr. Janney last night, did he indicate any intention of returning for the purpose of taking the deposition, having the deposition taken in Civil Action 311?
A He indicated an intention of returning; it was not a question of his returning for the appearance today.
Q Did he indicate that he would submit himself to the taking of the deposition in Civil 311?
A I did not ask him directly that question.
Q Has he ever indicated an intention of submitting himself for the taking of his deposition in action 311?
A Under proper circumstances, he has.
Q Well, will you tell us what those circumstances are that Mr. Janney has indicated he will submit himself for the taking of his deposition in Civil Action 311?
A Insofar as the matter was discussed with him and the particular circumstances enumerated, these would include the granting of appropriate relief under Rule 30(b)."

• • • •

"A His communication to me, as I recollect it, with regard to submitting to an examination had to do with the appropriateness of relief under Rule 30, that would include staying of the deposition, that would include an order that the deposition be taken in Pioche, rather than in Las Vegas; that would include the granting of relief that we have asked this Court to give us pursuant to the timely motion, that would expose the present plaintiffs as abusing the processes of the Court—for the purpose of backing up extortionate demands and for the disqualification of the attorneys that had served the notice on the ground of prior retainer. Those are what I recall of the grounds that are involved under Rule 30(b)."

• • • •

"Q All right. Last night did you tell Mr. Janney he was ordered by the Court to appear here today for physical examination by the doctors in Las Vegas?"

• • • •

"A Yes.
Q Did he indicate he would so appear or that he would attempt to appear?
A He indicated that he could not appear.
Q That he could not?
A That is right.
Q Why could he not appear?
A Lack of adequate notice and——
Q Well, he was physically able to travel to Texas, apparently, is that correct?
A He was not able to come on a half-day's notice from Houston, Texas, to Las Vegas, Nevada.
Q Did he make any attempt to obey the Court's Order to appear here today?
A You would have to ask him.
Q I am asking you if you know if he made any attempts to appear here.
A Yes.
Q As far as you know, Mr. Horton, did Mr. Janney make any attempt to come here in response to the Court's Order of yesterday.
A Not as far as I know.
Q Is he enroute here now, so far as you know?
A Not so far as I know.
Q Is he planning on staying in Houston, Texas, so far as you know?
A I am not certain of his plans.
Q Didn't he tell you what his plans were when you talked to him?
A He indicated he would return here in a week.
Q Pardon?
A He indicated that he would return in a week.
Q Return to Las Vegas or Pioche?
A Return to Nevada.
Q Did he indicate whether he would return to Pioche or to Las Vegas?

A I understood him to mean that he would return to Pioche.

Q When you talked to Mr. Janney last night on the telephone did he appear rational?

A Yes.

Q Coherent, logical, in command of his faculties?

A He appeared to me to be, yes."

Following the close of testimony, the following colloquy between court and counsel occurred:

"COURT: Let me ask you this—let me ask you this, if I defer acting on this until tomorrow morning or tomorrow afternoon, will you have Mr. Janney here tomorrow morning, here at ten o'clock?

MR. HORTON: I don't know, Your Honor."

• • • •

"MR. HORTON: He says the abstention of tension or——

COURT: Would hurt him—I don't think you would produce him here if I gave you an oportunity to produce him. You wouldn't do it.

MR. HORTON: Under the circumstances of this case, I wouldn't recommend to him that he come."

After further argument, the court ordered Janney's pleadings stricken, and his default entered.

Neither in his written motion to set aside the default, nor in the oral presentation of it, did Janney or his counsel offer his appearance for a deposition if the default were set aside. So far as this record shows, he is still unwilling to depose. Counsel's position has continuously been that he was under no duty to do so.

Counsel's view seems to be that a party need not appear if a motion under Rule 30(b), F.R.Civ.P. is on file, even though it has not been acted upon. Any such rule would be an intolerable clog upon the discovery process. Rule 30(b) places the burden on the proposed deponent to get an order, not just to make a motion. And if there is not time to have his motion heard, the least that he can be expected to do is to get an order postponing the time of the deposition until his motion can be heard. He

might also appear and seek to adjourn the deposition until an order can be obtained. (Rule 30(d)). But unless he has obtained a court order that postpones or dispenses with his duty to appear, that duty remains. Otherwise, as this case shows, a proposed deponent, by merely filing motions under Rule 30(b), could evade giving his deposition indefinitely. Under the Rules, it is for the court, not the deponent or his counsel, to relieve him of the duty to appear.

Nor did the peculiar rule of the local court, relating to motions, excuse him. That rule (Rule 7), indicates that ordinarily an oral hearing on a motion will not be held, but the motion will be decided upon the papers on file. It further provides that if opposition to the motion is not filed, this is deemed a consent to the granting of the motion. Here, opposition was filed, appellees' counsel requested a hearing, and the court, in reply, stated that Janney was to appear.

It is clear that the failure to appear was willful. It was not merely intentional; it was a direct flaunting of the authority of the court. It was conditional upon the court's granting relief that it had discretion to deny. No court is required to tolerate such deliberate defiance of its authority.

We are aware that the fifth amendment to the Constitution sets limits upon the authority conferred upon the court by Rule 37(d). See *Societe Internationale v. Rogers*, 1958, 357 U.S. 197, 208-10. But we can find no deprivation of due process here. The court kept the door open until it became very clear that Janney would depose only upon his own terms, regardless of what the court's terms might be. Rule 37(d) advised him of the consequences. The court did not abuse its discretion, either in ordering the default of Janney or in refusing to set it aside. (See *Collins v. Wayland*, 9 Cir., 1944, 139 F.2d 677)

We have thought it appropriate to burden this already lengthy opinion with quotation from the record because we think it well illustrates the pattern of evasion and obstruction, indeed open defiance, with which appellant Janney and his counsel met every effort of appellees and the trial court to secure his deposition. We endorse the sentiments of the many courts which have viewed the disposition of important interests by default judgment as an

unsatisfactory substitute for a full hearing on the merits (*e.g., Gill v. Stolow*, 2 Cir., 1957, 240 F.2d 669). We agree that a party should be deprived of his day in court only upon a strong showing of willful disobedience of court process. In this case, however, the portion of the record quoted above is but one sample of persistent conduct by appellant Janney which the trial court found to be willful. We think that finding not only well supported, but virtually inescapable.

The court did err, however, in ordering the default of the corporations. Appellees' counsel expressly stated that their motion was directed solely to the striking of Janney's pleadings and the entry of his default, and that he was not asking for such relief against the corporations. Nevertheless, the order that counsel prepared, and that the court signed, orders that the defendants' pleadings be stricken, and their default entered. The judgment is to the same effect. We think that, while Rule 37(d) gave the court authority to enter the default, it should not have done so, as to the corporations, when such relief was not sought. The rule itself provides for a motion and notice, and counsel made it clear, when the motion was heard, that his motion was not aimed at the corporations.

When this discrepancy between the motion and the resulting order was called to the court's attention, it declined to change it, apparently accepting the representation of appellees' counsel that default of the corporations was technical only, since they were nominal defendants against which no relief was sought. This view, however, failed to take account of the motion to appoint a receiver over the corporations, moreover, in striking the pleadings of the corporations, the trial court struck counterclaims by which the corporations had asserted claims for relief against plaintiff Dolman. We consider at a later point the significance of this error.

C. *The money judgment against Janney.*

Beginning on November 15, 1961 and continuing until December 15, 1961, the court took testimony, pursuant to Rule 55(b)(2), F.R.Civ.P. to determine the amount of damages to be awarded against Janney. This was based upon the second "cause of action" stated in the amended complaint which charged that

he had diverted corporate assets to his own use, to an extent that "exceeds the sum of $1,000,000." While this is a rather sketchy pleading, we think it sufficient, under Rule 8(a) and (e), F.R.Civ.P., to permit the court to proceed. No motion for a more definite statement (Rule 12(e)) was made.

On this issue, the findings are as follows:

"One of the principal assets of defendant Pioche Mines Consolidated, Inc. was that certain mine commonly known as the Ely Valley Mine located at Pioche, Nevada. Said corporation expended substantial amounts of money upon said mine.

"On numerous occasions defendant John Janney reported, in writing, to stockholders of said corporation and to investors in said corporations, that said mine was an asset of said corporation.

"While purporting to hold said Ely Valley Mine in trust for the benefit of the stockholders of Pioche Mines Consolidated, Inc., the said John Janney wrongfully converted the said mine for his own uses and purposes to the detriment of the stockholders of said corporation.

"As a result of said wrongful conversion of said Ely Valley Mine, net profits from the operation of said mine in excess of the sum of One Million Dollars ($1,000,000.00) were wrongfully used by the said John Janney, for his own purposes, which were not for the benefit of defendant Pioche Mines Consolidated, Inc., nor the stockholders thereof.

"Innocent third parties have subsequently acquired interests in the said Ely Valley Mine which prevent the return of said mine to defendant corporation Pioche Mines Consolidated, Inc.

"At all times involved herein, defendant John Janney wrongfully concealed, without cause, the true facts concerning his wrongful misappropriation of the said Ely Valley Mine from the stockholders of defendant corporation Pioche Mines Consolidated, Inc., and purported to hold the said mine for the benefit of the stockholders of said corporation. At no time prior to the commencement of this action did the said John Janney repudiate his claim that his holding

of Ely Valley Mine was for the benefit of the stockholders of Pioche Mines Consolidated, Inc. At no time prior to the commencement of this action did any of the stockholders of said corporation know, nor are they chargeable with constructive knowledge thereof, of the wrongful conversion by the said John Janney of the said mine, and the proceeds thereof.

"By reason of the foregoing, the stockholders of Pioche Mines Consolidated, Inc., exclusive of stockholder John Janney, have been damaged by the said John Janney in an amount in excess of One Million Dollars ($1,000,000.00)."

The time of the conversion is stated by appellees to be 1949, and the act of conversion the transfer of the mine to appellant Ely.

Appellants strenuously argue that the evidence does not support the findings. Their principal contention is that the Ely Valley Mine has always been the property of Janney, and never belonged to Pioche or its predecessor, Pioche Mines Company, and that therefore it could not have been an asset of Pioche, or, as such, converted by Janney.

The evidence that is claimed by appellees to support the findings is largely documentary, coming principally from the records of Pioche and Pioche Mines. It is not disputed that legal title to the mine was in Janney until 1939, when it was placed in the so-called "Ford trust." But there are a number of papers in the record in which it is asserted, by Pioche Mines Company or Janney, that the mine was an asset of that company. This was promotional material for the corporation, and Janney was president, a stockholder, and a principal promoter. It was also shown that, when Pioche was formed to take over the assets of Pioche Mines Company, and certain others, the literature sent to stockholders, who had thereto- re been told that the mine was an asset of Pioche Mines Company, did not tell them that it was *not* to be an asset of Pioche, thus leading to the inference that it would be.

Accounting records of Pioche were introduced, showing considerable expenditures by it on the mine. There is also material,

issued after the incorporation of Pioche, indicating that the mine was one of its assets. We think that the court could infer, as it did, that the beneficial ownership was in Pioche, even though, because of the informal manner in which the business was conducted by Janney, dry legal title remained in Janney. If the promoter of a corporation who holds title to an asset represents to the public at large, including the stockholders, that the asset belongs to the corporation, we think that the court can take him at his word. Janney attempted to explain this evidence away, but the court was not bound to, and did not, accept the explanation.

In 1939, Janney conveyed the mine, in trust, to one Ford. The conveyance was expressly for the benefit of the stockholders of Pioche, and bears the earmarks of a fraudulent conveyance designed to insulate the mine from the claims of parties engaged in litigation with Pioche, while permitting the use of the mine to obtain funds to fight the litigation. Janney explains it as an attempt by him personally to provide funds by the use of an asset of his own, for the same purpose. Again, the court was not required to believe him.

In 1949, the trust was terminated and the mine conveyed to Ely. This is the conversion relied upon. It will be noted, however, that the judgment is not based upon a finding as to the value of the mine. The finding is that net profits from operating the mine were not paid over to Pioche. It is urged that this finding is not supported. The finding is based on a statement, issued by Janney as president of Ely, showing moneys received and paid out to December 31, 1950. This does show "net from operations" of $1,049,728.86. The statement shows where the money went, and none of it went to Pioche, except a loan of $56,162.72. The latter would have no significance if the moneys loaned were in fact Pioche's money. The moneys were used for mine development, buildings, machinery and equipment, and to purchase interests in other properties. But none of these went to Pioche either. The judgment, insofar as it relates to Pioche, is supported.

However, no attempt was made to show any damage whatever to Ely, and none is found by the court.

D. ***The Receivership.***

We have concluded that it was error to appoint a receiver for the two appellant corporations, for several reasons.[5]

First, the prayer of the complaint is insufficient to permit the appointment on a default. The prayer, so far as material, is as follows:

> "4. That said corporations, and each of them, and the said JOHN JANNEY, be restrained from exercising any control or entering into any transaction with regard to the said corporations, until further order of this Court."

We think that a receivership is so different from an injunction that this can hardly be held to give notice to appellees that a receivership would be sought. (See ***Pueblo Trading Co. v. El Camino Irr. Dist.***, 9 Cir., 1948, 169 F.2d 312)

Second, as we have already held, it was error to enter the default of the two corporations. The default of Janney alone would not justify a default receivership of the corporations. His sold interest in that question would be in his capacities as president of and as a stockholder in each. The corporations were entitled to contest the application, and this right was not accorded to them. Not every receivership is beneficial to a corporation. There is always expense involved. Sometimes a receivership results in insolvency. Thus they were prejudiced by the entry of their defaults.

Third, we do not think that a receivership would be proper in this case in any event. Receivership is an ancillary remedy, and the substantive relief here sought does not justify its use. The only claims for substantive relief stated in the amended complaint are two. One is that the court should see that certain taxes be paid upon undesignated real properties. This has been done,

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[5]Appeals Nos. 3, 4, 5 and 7 relate to the appointment of the receiver. Nos. 3 and 4 appear to be premature. They also relate to orders that were clearly interlocutory. No. 5 relates to the actual appointment, and No. 7 to denial of motions to remove the receiver and to stay the order appointing. No. 9, the appeal from the judgment, also relates to the receivership, which is ordered continued in effect. These appeals, except Nos. 3 and 4, are properly before us under either section 1292(2) or section 1291, 28 U.S.C.

and the matter is moot. The other is for $1,000,000, on behalf of the corporations and against Janney. This has been awarded, as to Pioche. The only ancillary relief asked is the injunction referred to in the portion of the prayer quoted above. A receivership is not an end in itself; it is but a means to an end. Here no end was sought. Under the judgment, none is in sight.

There is a charge that Janney controls the corporations and their boards of directors, and has abandoned them and their properties, and that he has profited at their expense. But for all that appears, upon termination of his control by an injunction, or even without it, the stockholders would be able to meet, elect new boards of directors, and conduct the affairs of the corporations as they deem best. Nothing in the complaint indicates that they would not. In this respect, the motion for the appointment of a receiver, filed as a part of the motion for default judgment, adds little. It indicates that plaintiff Dolman has obtained a list of stockholders, has ascertained the addresses of many of them, and holds their proxies. For all that appears, they can control the corporations.

Both are Nevada corporations, and the law of Nevada provides ample means for rectifying the situation portrayed by the complaint and the affidavits. (See *e.g.*, Nevada Revised Statutes, §§78.335; 78.345; 78.600; 78.630; 78.635-45; 78.650-78.715) Appellees did not at any time claim to base their complaint upon any of these statutes. We need not decide whether, in a diversity case, a federal court could take jurisdiction of an action grounded upon any of these statutes. We presume that it could. This is not such an action.

Nor need we decide whether, in dealing with a request for a receivership in a diversity case, the court must apply state or federal law. If the applicable law be federal, on the theory that the relief is "ancillary," and the matter is "procedural," granting the relief here would be improper. *Gordon v. Washington*, 1935, 295 U.S. 30. It seems probable, however, that the applicable law is that of Nevada. See: *Guaranty Trust Co. v. York*, 1945, 326 U.S. 99; *Kohler v. McLellan*, 5 Cir., 1946, 156 F.2d 908; *Mintzer v. Arthur L. Wright & Co.*, 3 Cir., 1959, 263 F.2d 823; Moore, Federal Practice, §§2.09, 66.05; Note, 67 Harv.L.Rev. 836 (1954);

but see 1 Clark, Receivers §144(c), p. 232, (3d ed. 1959); compare *Byrd v. Blue Ridge Elec. Corp.*, 1956, 356 U.S. 525.

If Nevada law be applied, the result is the same, because appellees have not brought themselves within the terms of the applicable Nevada statutes, particularly Nev. Rev. Stat. §§78.650-78.715. That they would be required to do so is indicated by *Cohen v. Beneficial Loan Corp.*, 1949, 337 U.S. 541. See, also, *Shelton v. Second Judicial Dist. Court*, 1947, 64 Nev. 487, 185 P.2d 320, and compare *International Life Underwriters v. Second Judicial Dist. Court*, 1941, 61 Nev. 42, 113 P.2d 616.

The orders appointing the receiver, and the portion of the judgment that continues the appointment, must be reversed. The receiver must be required to account and to deliver the properties of the respective corporations to them, and be then discharged. (See *Brictson Mfg. Co. v. Close*, 8 Cir., 1922, 280 Fed. 297, 301)

E. *The Injunction.*

The court, by minute order of December 6, 1961, ordered the issuance of a temporary restraining order. This was embodied in a formal order on January 24, 1962. The order provides:

> "IT IS HEREBY ORDERED that the abovementioned defendants, and each of them, are hereby restrained from disposing of any and all assets, including moneys, of the abovementioned defendant corporations until further order of this Court;"

The court did not require a bond as provided in Rule 65(c) F.R. Civ.P. The order appointing the receiver, of March 16, 1962, also contains an injunctive provision as follows.

> "IT IS FURTHER ORDERED that said defendant corporations, their officers, managers and agents, are restrained from disposing of, transferring or removing any of their assets, properties, books, files, records and accounts, and they and each of them and all other parties having property in their possession or under their control belonging to said corporations are hereby directed to deliver the same to said receiver."

It requires a receiver's bond of $150,000. The first order fails utterly to comply with Rule 65(d); the second complies. The bond, however, is not the customary form of bond issued when an injunction is obtained (Rule 65(c)).

The judgment contains the following injunctive provisions:

> "Said defendant corporations, their officers, managers and agents, are restrained from disposing of, transferring, or removing any of the assets, properties, books, files, records and accounts of said corporations, and they and each of them and all other parties having property in their possession or under their control belonging to the said corporations are hereby directed to deliver the same to said Receiver.
>
> "Defendant John Janney is hereby restrained from disposing of or otherwise hypothecating his stock in the following corporations: Pioche Mines Consolidated, Inc., Ely Valley Mines, Inc., Pioche Power & Light Company."

Appeals Nos. 4, 5, 7 and 9 relate to these matters.

The order of January 24, 1962 must be reversed for failure to comply with Rule 65(d). The order of March 16, 1962 must be reversed because it is in aid of the receivership, as to which it is also being reversed.

The judgment, insofar as it enjoins anyone other than Janney, must also be reversed, because of the error in entering the default of the corporations. As it relates to Janney, it must be reversed insofar as it enjoins him from disposing of his stocks. There is no finding that these stocks were wrongfully acquired by him, or that any person other than Janney has any interest in them. See *Monte Rico Min. & Mill. Co. v. Fleming*, 8 Cir., 1919, 258 Fed. 106: "The right of a stockholder to sell and transfer his stock is one of the commonest incidents." (at 108)

Insofar as the judgment enjoins Janney from disposing of any of the corporate assets, it should be affirmed. There are findings that he has wrongfully done so, as to Pioche, and findings that he has failed in many of his obligations as an officer and director of both corporations. See *Monte Rico Min. & Mill. Co. v. Fleming*, *supra*.

F. The Expenses of Suit.

The judgment awards appellee Dolman $46,457.90 as expenses incurred or paid by her in prosecuting the action and $75,000.00 as compensation for her services. It also awards her counsel a total of $215,000.00. All of these sums are to be paid out of the $1,000,000.00 that Pioche is to recover from Janney.

No moneys have been recovered on behalf of Ely. The recovery on behalf of Pioche is for wrongs occurring long before Dolman became a stockholder on November 23, 1955. Thus, under Rule 23(b), F.R.Civ.P., Dolman had no standing to prosecute the action in relation to those wrongs. It was only because she and her counsel brought in other stockholders who were such at the time of the wrongs that the court could proceed to judgment against Janney. The record also shows that the other stockholders were brought in by Dolman and her counsel upon the express representation and understanding that there would be no expense to them.

While we have been cited to no authority on the question, and have found none, we think that to allow these portions of the judgment to stand would encourage a too easy avoidance of Rule 23(b). Our holding in this case that the court could properly proceed after the additional stockholders were brought in goes far enough. It does not follow that the single stockholder who instituted the action, but did not have standing to complain of the wrongs on which the judgment is based, should recover her expenses, including her attorneys' fees, much less that she should be paid for her efforts.[6] We think that her time and expense should be charged to her. Both she and her counsel knew when she acquired her stock, and the matter of her standing to bring the action was raised in the corporations' answer as early as April 4, 1960. Apparently, counsel either failed to read Rule 23(b) or elected to disregard it when they drew the complaint.

The award of counsel fees stands on a somewhat different footing. (See Hornstein, The Counsel Fee in Stockholders' Derivative Suits, 39 Colum. L. Rev 784, 811-12) As is there pointed

[6]We do not decide whether it is ever proper to award compensation, as distinguished from expenses, to one who successfully prosecutes a stockholders' derivative suit.

out, the corporation benefits from counsels' efforts, and often the stockholder plaintiffs do no more than lend their names. This may not be true of Dolman, but it is true of the other plaintiffs, who joined in the amended complaint.

We think that counsel are no more entitled to compensation for that part of their efforts that occurred when Dolman was their sole client than is Dolman herself. We also think, however, that the court can allow them compensation for that part of their efforts in obtaining the $1,000,000.00 judgment that occurred after the amended complaint was filed on June 6, 1961. At that point, as we have held, Rule 23(b) was complied with.

The court has already determined that the value of the services rendered by counsel, from May of 1958 to the date of judgment (October 8, 1962) is a total of $200,000 for one firm and $18,529.19 for local counsel. We do not disturb this finding. But we hold that only a portion of these sums should be paid out of the funds recovered for Pioche, namely, the portion that represents the value of services rendered on and after June 6, 1961. As to services rendered before that date, counsel must look to their client for payment.

We think it proper that judgment run in their favor. (See *Hutchinson Box Board & Paper Co. v. Van Horn*, 8 Cir., 1924, 299 F.2d 424, 426; *Angoff v. Goldfine*, 1 Cir., 1959, 270 F.2d 185.) Perhaps, in theory, the judgment for counsel fees should be in favor of their clients, who employed them. But in a very practical sense, counsel acted for the corporation, and therefore they should be paid direct, out of what they recover. They should not, however, be paid in full before any money goes to the corporation. Until collected, the judgment is but a paper, and counsel and the corporation should share, ratably, such sums as are in fact collected. The portions of the judgment awarding moneys for expenses, compensation, and attorneys' fees must be reversed in part and remanded.

G. *The Form of the Judgment.*

The judgment awards the receiver $1,000,000.00 against Janney, "for the benefit of Pioche Mines Consolidated, Inc. stockholders," exclusive of Janney. It further directs that moneys collected be

paid direct to the stockholders of Pioche, exclusive of Janney and of any other stockholders whom the court may hereafter designate.

This is error. Pioche is still an existing corporation, and the judgment belongs to it. (19 C.J.S., Corporations, §833d, pp. 254-55) Moreover, its creditors, if any, have rights against its assets that are superior to those of its shareholders. The judgment also confiscates a portion of the value of Janney's stock, which, so far as the record shows, is lawfully issued and outstanding. Its effect is to give his fellow shareholders a double recovery against him. We know of no rule of law or equity that supports this result. In these respects, the judgment must be reversed.

H. *The Orders Instructing the Receiver.*

Appeals Nos. 5 and 8 bring before us two orders instructing the receiver (28 U.S.C. §1292(a)(2)). The first is the ex parte order of March 20, 1962 It authorizes the receiver:

1. To employ counsel for Dolman as his counsel, on terms to be determined by the court.

2. To close the office of the corporations at Pioche and open an office at Las Vegas.

3. To employ a watchman at Pioche.

4. To open a checking account.

5. To advance $6,500 of his own funds, and issue to himself a receiver's certificate in that amount.

6. To pay a number of expenses:

(a) $300 per month for watchman.

(b) $100 per month for office overhead.

(c) Insurance premiums, in an amount to be determined.

(d) $1500 premium on his bond.

(e) $3500 to his attorneys for costs to be incurred in the Fidelity case.

(f) Up to $260 for expenses in preparing an inventory.

(g) Up to $500 for his travel and other incidental expenses.

7. To terminate any present employee of the corporations.
8. To take physical possession of all corporate assets.

The second is the order of May 24, 1962. This orders the receiver to take charge of the prosecution of the counterclaim of Pioche in the Fidelity case and for that purpose to retain counsel for Dolman. It restrains Janney and his attorneys from interfering with the receiver in so doing, and requires that they turn over to him all papers and evidence relating to the matter. It further authorizes the receiver to issue certificates, upon terms later to be authorized, and to use funds thus raised to pay the expenses of the litigation. The order expressly recognizes the right of Janney and his counsel to participate in the trial, "in cooperation with the Receiver and Intervenor [Dolman] and their counsel."

Since we hold that the appointment of a receiver was erroneous, these orders must be vacated. This does not, however, mean that none of the expenses authorized can be charged against Pioche or Ely. In effecting the final discharge of the receiver, the court must have a full accounting by him, upon notice and hearing. (*W. F. Potts Son v. Cochrane,* 5 Cir., 1932, 59 F.2d 375). The receiver is not personally liable for acts done by him within the scope of the authority conferred upon him by the court. (16 *Fletcher, Cyclopedia of Corporations,* §7864, p. 498 (Rev.ed. 1962)) Mr. Clark thinks that, although the receiver's appointment be erroneous, all costs of the receivership may properly be charged against the corporation's funds. (2 *Clark, Receivers* §637.1(m), p. 1065) Here, at least, we think not. The court has a discretion to charge the receiver's expenses either to the corporation or to the party who wrongfully obtained the receiver's appointment. (*Burnrite Coal Co. v. Riggs,* 1927, 274 U.S. 208).

The discretion of the court is to be exercised according to the justice and equity of each case. *Fulp v. McCray,* 8 Cir., 1927, 21 F.2d 951, 952. We think that Judge Hutcheson has well stated the rule that should be applied here. In *W. F. Potts Son v. Cochrane, supra,* he holds that those costs of the receivership that would not have arisen but for the appointment should be charged against the party invoking the receivership, here the

appellees. On the other hand, expenses that the corporation would have had to incur had there been no receiver, and expenses that confer a genuine benefit upon the corporation, should be charged to it. Here, the court has found that the appellees have acted in good faith, and we therefore think that the principles stated by Judge Hutcheson should be applied in this case.

In No. 17,709, it is ordered that:

1. Appeal No. 1, of November 6, 1961, appeal No. 2, of December 18, 1961, appeal No. 3, of January 4, 1962, and appeal No. 4 of February 5, 1962, are dismissed.

2. Insofar as the judgment awards $1,000,000.00 and costs against John Janney, it is affirmed; insofar as that judgment is in favor of the receiver, it is reversed, and the court is directed to substitute Pioche Mines Consolidated, Inc., a corporation, as the party in whose favor that part of the judgment is entered.

3. The judgment against Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. is reversed.

4. The order entering the defaults of those two corporations and striking their pleadings is reversed. The court is directed to reinstate their counterclaims.

5. The orders of December 16, 1961, January 24, 1962, and March 16, 1962, and the judgment, insofar as they direct the appointment of, or appoint the receiver, are reversed.

6. The orders of December 6, 1961, January 24, 1962, and March 16, 1962, insofar as they contain injunctive provisions, are reversed.

7. The judgment, insofar as it contains injunctive provisions against anyone other than appellant John Janney, his agents, servants, or employees, is reversed.

8. That part of the judgment which restrains John Janney from disposing of or otherwise hypothecating his stock in Pioche Mines Consolidated, Inc., Ely Valley Mines, Inc., and Pioche Power & Light Company, is reversed.

9. That part of the judgment which restrains John Janney and his agents from disposing of, transferring or removing any of the assets, properties, books, files, records and ac-

counts of Pioche Mines Consolidated, Inc. or of Ely Valley Mines, Inc., is affirmed.

10. Subparagraphs 1 and 2 of paragraph VIII of the judgment are reversed. Subparagraphs 3, 4, 5 and 6 of paragraph VIII are reversed and remanded. The court is directed to determine what portion of the services of the firm of Sullivan, Roche, Johnson & Farraher and Gerald O'Connor, Esq., and of Alvin N. Wartman, Esq., were rendered on and after June 6, 1961, and award to the firm a judgment for a corresponding portion of the sum of $200,000 and to Alvin N. Wartman a judgment for a corresponding fraction of $18,529.19, such judgments to be payable only out of the $1,000,000 recovered by Pioche from Janney, and only from sums actually collected in the proportion that the sums awarded to such attorneys, respectively, bear to the total recovery adjudged due to Pioche from Janney.

11. Plaintiffs may recover their taxable costs in the trial court from appellant John Janney, but no other costs or expenses.

12. The orders of March 20, 1962, and of May 24, 1962, instructing the receiver, are vacated.

13. The matter is remanded to the trial court with directions
    a. To modify the judgment in the manner hereinabove ordered.

    b. To enter a judgment that plaintiffs take nothing against Ely Valley Mines, Inc., or on its behalf, other than the portion of the injunction awarded against John Janney personally that is hereby affirmed, that the action be dismissed as against Ely Valley Mines, Inc., and that it recover its taxable costs in the trial court against plaintiffs.

    c. To vacate the appointment of the receiver, require him to account, settle his accounts in the manner herein approved, charge expenses of the receivership against such parties as may be appropriate under the principles stated in this opinion, require the receiver to deliver the respective properties, books, files, records

and accounts of Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc., to them, and upon the settlement of his accounts and the completion of his duties, discharge him.

d. To take all other actions necessary to carry out the foregoing orders and such further proceedings as shall be consistent with this opinion.

14. Appellees are awarded one-half of their costs on appeal against appellant John Janney; otherwise, each party shall bear his, her, or its own costs on appeal.

In No. 18,192, the appeal is dismissed.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PIOCHE MINES CONSOLIDATED INC., ELY VALLEY MINES, INC., and JOHN JANNEY, *Appellants,* vs. HELEN DOLMAN, et al., *Appellees.*	No. 17,709

JUDGMENT

APPEAL from the United States District Court for the District of Nevada.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that Appeal No. 1, of November 6, 1961, appeal No. 2, of December 18, 1961, appeal No. 3, of January 4, 1962, and appeal No. 4 of February 5, 1962, be and each hereby is dismissed.

Insofar as the judgment awards $1,000,000.00 and costs against John Janney, it is affirmed; insofar as that judgment is in favor of the receiver, it is reversed, and the court is directed to substitute Pioche Mines Consolidated, Inc., a corporation, as the party in whose favor that part of the judgment is entered.

The judgment against Pioche Mines Consolidated, Inc., and Ely Valley Mines, Inc. is reversed.

The order entering the defaults of those two corporations and striking their pleadings is reversed. The Court is directed to reinstate their counterclaims.

The orders of December 16, 1961, January 24, 1962, and March 16, 1962, and the judgment, insofar as they direct the appointment of, or appoint the receiver, are reversed.

The orders of December 6, 1961, January 24, 1962, and March 16, 1962, insofar as they contain injunctive provisions, are reversed.

The judgment, insofar as it contains injunctive provisions against anyone other than appellant John Janney, his agents, servants, or employees, is reversed.

That part of the judgment which restrains John Janney from disposing of or otherwise hypothecating his stock in Pioche Mines Consolidated, Inc., Ely Valley Mines, Inc., and Pioche Power & Light Company, is reversed.

That part of the judgment which restrains John Janney and his agents from disposing of, transferring or removing any of the assets, properties, books, files, records and accounts of Pioche Mines Consolidated, Inc., or of Ely Valley Mines, Inc., is affirmed.

Subparagraphs 1 and 2 of paragraph VIII of the judgment are reversed. Subparagraphs 3, 4, 5 and 6 of Paragraph VIII are reversed and remanded. The Court is directed to determine what portion of the services of the firm of Sullivan, Roche, Johnson & Farraher and Gerald O'Connor, Esq., and of Alvin N. Wartman, Esq., were rendered on and after June 6, 1961, and award to the firm a judgment for a corresponding portion of the sum of $200,000 and to Alvin N. Wartman a judgment for a corresponding fraction of $18,529.19, such judgments to be payable only out of the $1,000,000 recovered by Pioche from Janney, and only from sums actually collected in the proportion that the sums awarded to such attorneys, respectively, bear to the total recovery adjudged due to Pioche from Janney.

Plaintiffs may recover their taxable costs in the trial Court from appellant John Janney, but no other costs or expenses.

The orders of March 20, 1962, and of May 24, 1962, instructing the receiver, are vacated.

The matter is remanded to the trial court with directions

a. To modify the judgment in the manner hereinabove ordered.

b. To enter a judgment that plaintiffs take nothing against Ely Valley Mines, Inc., or on its behalf, other than the portion of the injunction awarded against John Janney

personally that is hereby affirmed, that the action be dismissed as against Ely Valley Mines, Inc., and that it recover its taxable costs in the trial court against plaintiffs.

c. To vacate the appointment of the receiver, require him to account, settle his accounts in the manner herein approved, charge expenses of the receivership against such parties as may be appropriate under the principles stated in the opinion, require the receiver to deliver the respective properties, books, files, records and accounts of Pioche Mines Consolidated, Inc., and Ely Valley Mines, Inc., to them, and upon the settlement of his accounts and the completion of his duties, discharge him.

d. To take all other actions necessary to carry out the foregoing orders, and such further proceedings as shall be consistent with the opinion of this Court.

Appellees are awarded one-half of their costs on appeal against appellant John Janney; otherwise, each party shall bear his, her, or its own costs on appeal.

Filed and entered May 21, 1964.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN JANNEY, *Appellant,* vs. HELEN DOLMAN, *Appellee.*	No. 18,192

JUDGMENT

APPEAL from the United States District Court for the District of Nevada.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the appeal in this Cause be, and hereby is dismissed.

Filed and entered May 21, 1964.